IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 859 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE B.J.SHETHNA sd/-
and
HON'BLE MR.JUSTICE J.R.VORA sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

ZALA JAYVANTSINH FALJIBHAI

Versus

STATE OF GUJARAT

Appearance:

1. Special Criminal Application No. 859 of 2003
PARTY-IN-PERSON for Petitioner No. 1
MR RC KODEKAR, A.P.P. for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE B.J.SHETHNA
and
HON'BLE MR.JUSTICE J.R.VORA

Date of decision: 09/12/2003

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE B.J.SHETHNA)

1. Rule. Learned A.P.P. Shri R.C.Kodekar, waives

service of Rule for the respondent - State. With the consent of the parties the matter is heard and finally disposed of by this Judgment.

2. Petitioner Shri Jayvantsinh Faljibhai Zala (J.F. Zala) has filed this petition, in person, in the name of "Public Interest Litigation" before this Court under Article 226 and 254 of the Constitution of India and prayed that Notifications No.GG/365/79/SB-I/CLA-1079/ 10726 and GG/366/79/SB-I/CLA-1979/10727, dated 14th December 1979, issued by the State of Gujarat, be declared void and illegal and also prayed for stay of said Notifications.

3. The Criminal Law Amendment Act, 1932 (Act of XXIII of 1932) came into force with immediate effect in 1932, as the Civil disobedience movement has made it necessary to supplement the Criminal Law by means of certain Ordinances promulgated by the Governor General in exercise of his powers under S.72 of the Government of India Act.

Section 10 of Act empowers the State Government to make certain offences cognizable and non-bailable. Under Section 10(1) the State Government may by notification in the Official Gazette, declare that any offence punishable under Ss. 186, 188, 189, 190, 228, 295A, 298, 505, 506 or 507 of the Indian Penal Code, when committed in any area specified in the notification shall, notwithstanding anything contained in the Code of Criminal Procedure, 1898, be cognizable and thereupon the Code of Criminal Procedure, 1898 shall, while such notification remains in force, be deemed to be amended accordingly.

U/s. 10(2) The State Government may, in like manner and subject to the like conditions, and with the like effect, declare that an offence punishable under section 188 or section 506 of the Indian Penal Code shall be non-bailable.

Section : 186 - Obstructing public servant in discharge of his functions is an offence u/s. 186 I.P.Code, which is punishable upto 3 months or fine of 500 rupees, or both. It is non-cognizable, bailable and triable by any Magistrate.

Section : 188 - Disobedience to an order lawfully promulgated by a public servant, if such disobedience causes obstruction, annoyance or

injury to persons lawfully employed is punishable upto one month's S.I. or fine of Rs.200/- or both and if such disobedience causes danger to human life, health or safety, etc. then it is an offence u/s.188 I.P.C. which is punishable upto 6 months or fine of Rs.1000/- or both. The same is cognizable and bailable and triable by any Magistrate.

Section : 189 - Threatening a public servant with injury to him or one in whom he is interested to induce him to do or forbear to do any official act, which is punishable upto 2 years imprisonment or fine or both. It is non-cognizable, but bailable and triable by any Magistrate.

Section : 190 - Threatening any person to induce him to refrain from making a legal application for protection from injury, which is punishable upto 1 year's imprisonment or fine or both. The same is non-cognizable, but bailable and triable by any Magistrate.

Section : 228 - Intentional insult or interruption to a public servant sitting in any stage of a judicial proceeding, which is punishable for 6 month's S.I. or fine of Rs.1000/- or both. It is non-cognizable, bailable and it may be tried by the Court in which the offence is committed subject to the provisions of Chapter : XXVI.

Section : 295A - Maliciously insulting the religion or the religious beliefs of any case, which is punishable for imprisonment for 3 years, or fine, or both. It is cognizable, non-bailable and tried by Magistrate of the First Class.

Section : 298 - Uttering any word or making any sound in the hearing or making any gesture, or placing any object in the sight of any person, with intention to wound his religious feelings, which is punishable for one year's imprisonment or fine, or both. It is non-cognizable, but bailable and triable by any Magistrate.

Section : 505 - False statement, rumour, etc. circulated with intent to cause mutiny or offence against the public peace or false statement, rumour, etc. with intent to create enmity,

hatred or ill-will between different classes, which is punishable for 3 years' imprisonment, or fine, or both. It is Cognizable and non-bailable and triable by any Magistrate. False statement, rumour, etc. made in place of worship etc.with intent to create enmity hatred or ill-will, which is punishable for 5 years imprisonment and fine. It is cognizable and non-bailable and triable by any Magistrate.

Section : 506 - Criminal intimidation - Simple criminal intimidation is punishable upto 2 years imprisonment or fine, or both, the same is non-cognizable, bailable and triable by any Magistrate, and if threat to cause death or grievous hurt, is there then it is an offence u/s.506 punishable upto 7 years, or fine, or both. The same is non-cognizable and bailable and triable by Magistrate of the First Class.

Section : 507 - Criminal Intimidation by anonymous communication or having taken precaution to conceal when the threat comes, which is punishment for 2 years Imprisonment, in addition to the punishment under above section. It is non-cognizable and bailable, which is triable by the Magistrate of the First Class.

4. The Respondent - State of Gujarat issued Notification No.GG/365/79/SB.I/CLA-1079/10726 in exercise of the powers conferred on it u/ss. 10(1) (2) of the Criminal Law Amendment Act, 1932 and declared Sections 186, 189, 190, 228, 295A, 298, 505, 506 or 507 of the I.P.Code be cognizable, notwithstanding anything contained in the Code of Criminal Procedure, 1973, if it is committed in any area of the State of Gujarat, and made the offences punishable u/ss. 188 and 506 I.P.Code Non-bailable.

The respondent - State of Gujarat has also issued Notification No.GG/366/79/SB.I/CLA.1079/10726 in exercise of the powers conferred on it under Sub.Section 4 of Section 1 of Criminal Law Amendment Act, 1932, and directed that Section 7 of the said Act shall come into force in the whole of the State of Gujarat with effect from 15.12.1979. Section 7 reads as under :

7. Molesting a person to prejudice of employment of business - Whoever -

(a) with intent to cause any person to abstain from doing obstructs or uses violence to or intimidate such person or any member of his family or person in employment, or loiters at or near a place where such person or member or employed person resides or works or carries on business or happens to be, or persistently follows him from place to place, or interferes with any property owned or used by him or deprives him of or hinders from in the use thereof, or

(b) loiters or does any similar act at or near the place where a person carries on business, in such a way and with intent that any person may thereby be deterred from entering or approaching or dealing at such place.

Both these Notifications dated 14.12.1979 (Annexure:A) have been issued in the Special Official Gazette dated 27.12.1979. The same are challenged in this petition by the petitioner by way of this petition.

5. It was submitted by Shri Zala, who is appearing in person, that the respondent - State of Gujarat should not have issued such Notifications (Annexure : A) by way of simple Notification because no amendment can be brought to the Central Legislation by way of simple notification. There should be either Ordinance or order, and it should not have been done without the assent of the President of India. In support of his submission Shri Zala has relied on the Division Bench Judgment of Allahabad High Court in the case of VIRENDRA SINGH & ORS. v/s. STATE OF UP & ORS. reported in 2002 Cri.L.J.4265.

However, learned A.P.P. Shri Kodekar, appearing for the respondent - State of Gujarat, vehemently submitted that the petitioner has no locus-standi to challenge such notification in the name of "public interest litigation". He submitted that the point in issue is squarely covered in his favour by the Division Bench Judgment of this Court in the case of VINOD RAO v/s. STATE OF GUJARAT, reported in XXI GLR 926. He, therefore, submitted that this petition be dismissed with costs.

6. In the case of Virendra Singh (supra), Virendra Singh and other accused had approached Allahabad High Court by way of Criminal Misc. Writ Petition No.4188 of

2002, challenging the F.I.R. dated 12.7.2002, filed against them u/s.506 I.P.C. Section 506 I.P.C. is non-cognizable and bailable as mentioned in Ist Schedule to the Criminal Procedure Code, 1973. However, U.P. State Government by its Notification No.777/VIII 9-4(2)-87 dtd.31.7.1989, published in the U.P. Gazette, Extra. Part-4, Section (kha) dated 2.8.1989 and declared it to be a cognizable and non-bailable offence. It purported to have been issued u/ss. 10(1) and 10(2) of the Criminal Law Amendment Act, 1932. The Division Bench of the Allahabad High Court held that Section 10 of the Act of 1932 does not give power to the State Government to amend, by a simple notification, any part of Criminal Procedure Code, 1973. Since the Cr.P.C. of 1898 was repealed by section 484 of Cr.P.C. of 1973, Section 10 of the Criminal Law Amendment Act, 1932 became redundant and otiose. Therefore, no notification can now be issued u/s.10 of the Act of 1932 and any such notification issued u/s.10 of the Act then it would be illegal and accordingly the said notification was declared to be illegal. The Division Bench of the Allahabad High Court has further held that Cr.P.C. of 1973 is a Parliamentary enactment and, therefore, it can only be amended by another Act or by an Ordinance, but not by a simple notification and that too, when the assent of the President as required under Art. 254(2) of the Constitution.

7. From the above, it is clear that it was not a public interest petition filed before the Allahabad High Court. The petition was filed by the accused persons, who were, directly or indirectly, affected by the impugned notification at Annexure : A. The petitioner has orally stated before us that he is a retired Head-Master of the School and for academic purpose he had prepared the petition and filed it before this Court as, according to him, at times the police is mis-using the provision of the Act. Be that as it may. We would not like to go into this. However, we must state that no public interest is involved in this petition, therefore, only on this ground the petition was required to be dismissed. However, when the Hon'ble Ist Court thought it fit to issue Notice in this matter and reply Affidavit and the Affidavit in Rejoinder is also filed, then we have thought it fit to deal with the contentions of the petitioner on merits.

8. It is true that the Division Bench of Allahabad High Court has declared similar notification as illegal and bad. The main thing which weighed with the High Court was that it could not have been done by issuing

simple notification. It could have been done either by introducing another Act or by Ordinance and that too after obtaining assent of the President of India under Article 254(2) of the Constitution. However, bare reading of Section 10 of the Criminal Law Amendment Act, 1932, makes it clear that the State Government may by issuing Notification in the Official Gazette declare any offences punishable u/ss. 186, 189, 190, 228, 295A,298, 505, 506 or 507 I.P.Code cognizable and non-bailable, notwithstanding anything contained in the Code of Criminal Procedure, 1898. It is no where provided under the Act of 1932 that it can be done only by way of introducing another Act or issuing Ordinance after obtaining the assent of the President under Article 254(2) of the Constitution.

9. It clearly appears from the bare reading of the judgment of the Allahabad High Court in Virendra Sinh's case (supra) that the Judgment delivered by the Division Bench of this Court in the case of Vinod Rao v/s. State of Gujarat & another, was much earlier in point of time, in 1980 XXI GLR 926, it was neither brought to the notice of Allahabad High Court nor considered by the Allahabad High Court. In Vinod Rao's case (supra) validity of the impugned notification dated 15.11.1937 and Notification dated 31.7.1970, issued u/s. 10 (1) (2) of the Criminal Law Amendment Act, 1932, was challenged on the ground that it was ultravires to Article 14 of the Constitution. The Division Bench of this Court negating the said challenge and held that Notification, issued under the Act of 1932, cannot be said to be discriminatory and violating Article 14 of the Constitution. Thus, challenge to the powers of the State Government, issuing notification u/s. 10 of the Act, was set at rest by the Division Bench of this Court way back in 1980. Several contentions were raised before the Division Bench of this Court in Vinod Rao's case (supra). The last contention raised by Mr.Zala was that the Notification issued under Sub.section (1) & (2) of Section 10 of the Criminal Law Amendment Act, 1932, with reference to Code of Criminal Procedure, 1898, cannot be regarded as Notification issued with reference to Code of Criminal Procedure, 1973. The object of issuing notification u/s. 10(1)(2) of the Act of 1932 was to amend the Code of Criminal Procedure, 1898 which has been repealed by the Code of Criminal Procedure, 1973. Therefore, the amendment which was made to that Code by the impugned notification could not be continued or read in the Code of Criminal Procedure, 1973. This contention was rejected by the Division Bench of this Court in view of the provision contained in Section 8 of the General

Clauses Act, 1897. Applying the rule of construction laid down in Section 8 of the General Clauses Act, the Division Bench of this Court read in Section 10 of the Criminal Law Amendment Act, 1932, the Code of Criminal Procedure, 1973 in place of the expression "Code of Criminal Procedure, 1898", and held that the notification issued u/s.10 with reference to Code of Criminal Procedure, 1898, should be read as having been issued with reference to the Code of Criminal Procedure, 1973.

However, Shri Zala, appearing in person, submitted that the Judgment of the Division Bench of this Court in Vinod Rao's case (supra) cited by learned A.P.P. Shri Kodekar is per incuriam, therefore, cannot be looked into and applied in this case. On the basis of the averments made in Para : 14 of his Affidavit in Rejoinder, he submitted that in Vinod Rao's case (supra) notifications dated 15.11.1937 and 31.7.1970 were challenged in 1978 and the matter was pending before this Court till January 17/18, 1980, and during the pendency of the said petition the repealed Code of Criminal Procedure, 1973, came into force with effect from 1.4.1974. Neither the applicant nor his learned Counsel in Vinod Rao's case (supra) made the argument in the context of changed legal position. Mean while, during the pendency of the petition the respondent had issued impugned notification dated 14.12.1979 (Annexure : A to this petition) which is under challenge in this petition. He submitted that subsequent notifications dated 14.12.1979 were not brought to the notice of the Division Bench of this Court by the respondent - State of Gujarat in Vinod Rao's case and it was not argued on the various law points, therefore, the Judgment delivered by the Division Bench of this Court in Vinod Rao's case (supra) is per incuriam. We are afraid, we cannot accept this submission of Shri Zala. It is true that during the pendency and final disposal of the petition, filed in Vinod Rao's case (supra) the impugned notification dated 14.12.1979 came to be issued by the respondent - state of Gujarat, but the point in question was very well considered by the Division Bench of this Court in Vinod Rao's case and we are in complete agreement with the view taken by the Division Bench of this Court in Vinod Rao's Case (supra).

10. In view of the above, we would rather prefer to rely on the Judgment delivered by the Division Bench of our own Court rather than the Judgment delivered by the another High Court.

11. Except the aforesaid contention no other

contention was raised by Shri Zala, appearing as party in person.

12. In view of the above discussion, we do not find any substance or merits in this petition and accordingly it is dismissed. Rule is discharged.

sd/-

(B.J.Shethna, J.)

Date : December 10, 2003 sd/-

(J. R. Vora, J.)

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